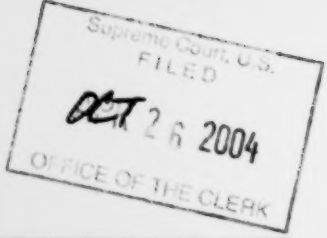

(5)

No. 04-184

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

On Petition for Writ of Certiorari
to the Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ERIC A. SAMLER
Counsel of Record for Petitioner
SAMLER & WHITSON, P.C.
1776 Lincoln Street,
Suite 1010
Denver, Colorado 80203
303-670-0575

No. 04-184

IN THE

SUPREME COURT OF THE UNITED STATES

C.M.C.,

PETITIONER,

versus

G.A.L. and K.L.,

RESPONDENTS.

On Petition for Writ of Certiorari
to the Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ERIC A. SAMLER
Counsel of Record for Petitioner
SAMLER & WHITSON, P.C.
1776 Lincoln Street,
Suite 1010
Denver, Colorado 80203
303-670-0575

TABLE OF CONTENTS

Table of Authorities ii

INTRODUCTION 1

1. The federal question is properly before this Court 1

2. The PKPA is applicable to this case. 2

3. a) Missouri did not decline to exercise jurisdiction. 4

3. b) The Missouri action was pending at the time of the Colorado action. 7

4. Respondents do not have a due process claim .. 8

CONCLUSION 10

TABLE OF AUTHORITIES

U.S. CONST., Art. IV, section 1 1

Parental Kidnaping Prevention Act of 1980 (PKPA), 28 U.S.C.A., section 1738A (2003) 1-8

section 1738A(b)(3) (2003) 3

PARENTAL KIDNAPING PREVENTION ACT OF 1979: JOINT HEARING ON S. 105 BEFORE THE SUBCOMMITTEE ON CHILD AND HUMAN DEVELOPMENT OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, 96th Cong. 2d Sess. 48 (1980) 1

Adoption of a Minor, 438 N.E.2d 38 (Mass.1982) 9

Coleman v. Thompson 111 S.Ct. 2546 (1991) 2

Cotton v. Wise, 977 S.W.2d 263, 264 (Mo.1998) 6

Drummond v. Fulton County Depart. of Family & Children's Services, 563 F.2d 1200 (5th Cir.1977) 8

Durfee v. Duke 84 S.Ct. 242 (1963) 2

Engstrom v. Iowa, 461 N.W.2d 309, 319 (Iowa 1990) 8

In re Adoption/Guardianship No. 2633, 101 Md.App. 274, 646 A.2d 1036 (1994) 8

In re Dependency of J.H., 117 Wash.2d 460, 815 P.2d 1380 (1991) 8

In Interests of A.C., 415 N.W.2d 609 (Iowa 1987) 8

Johnson v. Burnett, 182 Ill.App.3d 574, 538 N.E.2d 892 (1989) 8

Kyees v. County Department of Public Welfare of Tippecanoe County, 600 F.2d 693 (7th Cir.1979) 8

Michigan v. Long, 463 U.S. 1032, (1983) 2

People ex rel. A.J.C., 88 P.3d 599 (Colo. 2004) 3

People ex rel. A.W.R., 17 P.3d 192 (Colo.App.2000) 9

Procopio v. Johnson, 994 F.2d 325 (7th Cir. 1993) 8

Renfro v. Cuyahoga County Department of Human Services, 884 F.2d 943 (6th Cir. 1989) 8

Rodriguez v. McLoughlin, 214 F.3d 328 (2nd Cir. 2000) ... 8

Rotary Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537 (1987) 2

Thompson v. Thompson, 484 U.S. 174 (1988) 4

INTRODUCTION

Respondents reframed the issues and presented new ones that require a response.

1. The federal question is properly before this Court.

In the state court Petitioner argued that the Colorado Courts must give full faith and credit to the Missouri Court Order. *See Respondent's Appendix* p. 2. 28 USC §1738 A (PKPA) was passed to ensure that states would give full faith and credit to custody decrees of other states. See Testimony of Acting Deputy Attorney General Michel, 96 Cong. Sess. 48 (1980.) The PKPA ensures that parties involved in interstate custody disputes are protected by the full faith and credit clause of the United States Constitution (Art IV sec. I).

The issue was fully before the Colorado Supreme Court, which, over the dissent of Justice Coats, specifically held that the PKPA does not require Colorado to give full faith and credit to the

Missouri custody decree. Respondents' reliance on Rotary Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537 (1987) is misplaced. In that case, the state court did not address the federal question. Here, the Colorado Supreme Court ruled on the applicability of the PKPA, and wrongfully decided that Colorado need not follow federal law. *Cf.* Michigan v. Long, 463 U.S. 1032, (1983); Coleman v. Thompson 111 S.Ct. 2546 (1991); Durfee v. Duke 84 S.Ct. 242 (1963).

The Colorado Supreme Court decided an issue of federal law, and Petitioner challenges Colorado's interpretation of federal law. The issue was presented to the Colorado Supreme Court and the Court ruled on the issue. Jurisdictional requirements are therefore satisfied.

2. **The PKPA is applicable to this case.**

Respondents contend that the Missouri order returning physical custody of the child to his mother is not a "custody determination" because it occurred in the context of a failed adoption proceeding. Respondents rely upon Colorado State

law – the UCCJEA – but the Colorado Supreme Court held that the Missouri Court had continuing jurisdiction precisely because its order is a custody determination. People ex rel. A.J.C., 88 P.3d 599, 612 (Colo. 2004).

Moreover, Respondents' reliance upon a provision in the UCCJEA (i.e. Colorado state law) in determining if the Missouri order is a custody decree is misplaced. The question is not whether the Missouri court order constitutes a custody decree under Colorado state law, rather the question is whether the Missouri order is a custody determination under the PKPA. The PKPA defines a custody determination as "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 USC § 1738A(b)(3). The order entered by the Missouri Court meets this criteria. The fact that under Colorado law a custody order made in a failed adoption proceeding **might** be exempted from the provisions of the UCCJEA has no bearing on the applicability of the PKPA.

Thompson v. Thompson, 484 U.S. 174 (1988) does not mandate a different result. The language in Thompson quoted by Respondent refers to the UCCJA which, unlike the UCCJEA, does not have a provision excluding adoption proceedings. The issue of jurisdiction cannot be decided by application of substantive Colorado law.

3. a) Missouri did not decline to exercise jurisdiction.

Respondents argue that because the Missouri Court stated that the adoption proceeding was not a "proper forum to determine custody between **mother and father,"** the Missouri Court did not determine custody of the child as between Petitioner and Respondents. This is untrue. While the Missouri Court ruled that a failed adoption proceeding was not the proper forum to determine custody between mother and father, the Court did not rule that it could not determine custody between the Petitioner (mother of the child) and an unrelated third party (Respondents). To the contrary, the court determined custody and ordered that the child be returned immediately to

his mother. A custody order was entered and that order is enforceable.

The Colorado Supreme Court refused to apply the PKPA not because a custody determination had not been made, but because the Court believed that Missouri declined to exercise jurisdiction by not applying the "best interest of the child" analysis. Under Colorado law, while there is a presumption that it is in the child's best interest to be raised by his or her parents, that presumption is easily rebuttable. The third party need only come forward with evidence regarding the child's "best interest." At least thirty-eight states including Missouri do not apply a "best interest analysis" in custody disputes between parents and non-parents[1] The tests in these states differ as well. Missouri requires a showing of unfitness, abandonment, or "extraordinary

---

1.
Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin.

circumstances." Cotton v. Wise, 977 S.W.2d 263, 264 (Mo.1998). Presumably, the thirty-seven other states listed in footnote one would find that Missouri did not decline to exercise jurisdiction under the PKPA, while those states that do apply a "best interest" analysis might find that Missouri did decline to exercise jurisdiction. If Respondents' interpretation prevails, federal law would be interpreted differently from state to state depending upon each state's unique statutory definition and legal custody criteria. This would defeat the entire purpose of the PKPA and restores the "seize-and -run" chaos that pre-dated the PKPA. This Court should grant Certiorari and resolve this issue to ensure that federal law is interpreted and applied consistently in all states.

3. b) The Missouri action was pending at the time of the Colorado action.

The Missouri case was pending when Respondents filed their action in Colorado. Three days after filing for custody in Colorado, Respondents filed in Missouri a Motion to Vacate the Judgment dismissing their request to adopt the child and awarding custody to Petitioner. One day prior to Colorado dismissing their petition for custody, the Missouri Court denied the Motion to Vacate. After the denial of their Motion, Respondents continued to litigate the Missouri case by filing an appeal. Therefore, the case was pending as that term is used in the PKPA. By denying the Respondents the right to adopt the child, the Missouri Court did not divest itself of the authority to enter an order removing physical custody of the child from Respondents and granting physical custody of the child to Petitioner. A custody determination was entered by the Missouri Court and pursuant to the PKPA was enforceable in every state including Colorado.

4. Respondents do not have a due process claim

Respondents' due process argument is unavailing because they do not have a constitutionally-protected liberty interest. Rodriguez v. McLoughlin, 214 F.3d 328 (2nd Cir. 2000)(prior to finalization of adoption no liberty interest exists); Procopio v. Johnson, 994 F.2d 325 (7th Cir. 1993) (no liberty interest); Renfro v. Cuyahoga County Department of Human Services, 884 F.2d 943 (6th Cir. 1989); Kyees v. County Department of Public Welfare of Tippecanoe County, 600 F.2d 693 (7th Cir.1979); Drummond v. Fulton County Depart. of Family & Children's Services, 563 F.2d 1200 (5th Cir.1977); Johnson v. Burnett, 182 Ill.App.3d 574, 538 N.E.2d 892 (1989); In Interests of A.C., 415 N.W.2d 609 (Iowa 1987); *In* re Adoption/Guardianship No. 2633, 101 Md.App. 274, 646 A.2d 1036 (1994); Adoption of a Minor, 386 Mass. 741, 438 N.E.2d 38 (1982); In re Dependency of J.H., 117 Wash.2d 460, 815 P.2d 1380 (1991); Engstrom v. Iowa, 461 N.W.2d 309,

319 (Iowa 1990) (Preadoptive parents did not have protected liberty interest in prefamilial relationship with child); People ex rel. A.W.R., 17 P.3d 192 (Colo.App.2000)(the question is whether the foster parents have a realistic expectation of the continuation of the foster-parent foster-child relationship.)

Respondents signed documents acknowledging that the placement of the child with them was "legally at risk" and that if Petitioner's parental rights were not terminated, they would relinquish the child. In the document transferring temporary custody to Respondents, Petitioner reserved the right to change her mind and request the return of her child prior to the court's acceptance of her consent to terminate her parental rights. Until such time as Petitioner's parental rights were terminated, Respondents had no realistic expectation of the continuation of that relationship. Absent a realistic expectation of continued physical custody of the child, there is not a constitutionally-protected liberty interest.

The due process clause is therefore not implicated.

CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Colorado Supreme Court and vacate its Order and Judgment, and stay implementation of the Order and Judgment during the pendency of this petition for a Writ of Certiorari.

Respectfully submitted,

Eric A. Samler
Counsel for Petitioner
Samler & Whitson, P.C.
1776 Lincoln St., Suite 1010
Denver, CO 80203
Telephone: 303 670-0575